HOTEL AMBASSADOR (M) SDN. BHD.

v.

SEAPOWER (M) SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-373-90]
24 JANUARY 1991

CIVIL PROCEDURE: *Whether Judge has jurisdiction to make order of possession on interlocutory application - Rules of the High Court 1980, O. 33 rr. 2 and 5. [Res judicata - Issue estoppel - Statutory provision - Summary procedure - Not final decision on status - Obiter statements - Rules of the High Court 1980, O. 89.]*

LAND LAW: *Tenancy - Whether licensee or trespasser - 10 year period - Option to renew not exercised - Nature of existing tenancy - Registered or protected tenancies on register document of title - Exempt from registration - Date of registration of certificate of sale - National Land Code 1965, ss. 213(1)(a), 228(1)(a), 259(3), 267(2).*

The appellants, A, the proprietors of Hotel Ambassador HA entered into possession of the said property pursuant to a lease dated 2 January 1967 entered into between A and the proprietors of the said property. The lease was for a period of 10 years at RM11,000 per month and contained an option to renew for further 10 years - this option was never exercised nor registered and A continued occupation of the said property.

At a public auction held under the National Land Code 1965 (NLC), the respondent company S purchased the said property; on payment of the full purchase price of RM6 million, a certificate of sale was issued by the Senior Assistant Registrar (SAR) under s. 259(3) of the NLC; clause 8 of the conditions of sale provided that the property was sold subject to all existing tenancies and that the purchaser shall be let into possession upon payment of the full purchase price.

The previous owners had sued for the recovery of arrears of rentals in respect of February 1984 - May 1989 and for vacant possession. They obtained judgment for the former but abandoned their claim for the latter. On 16 February 1990 S claimed possession of the said property under O. 89 of the Rules of the High Court 1980 (RHC), but this was dismissed by Wan Adnan J. On 29 May 1990, A filed a writ for various orders including a declaration that they were the lawful tenants of the said property and order restraining S from interfering with A's lawful possession of the said property. On 20 May 1990, A obtained an order of restraint *ex parte*; the application to set aside this restraining order was allowed by Edgar Joseph Jr. J and vacant possession was granted to S - this order was later varied by the Judge's exercise of his powers under the slip rule to require A to deliver vacant possession to S.

The appellants appeal on the following grounds:

(1) ***Jurisdiction***

(a) the claim for vacant possession before Edgar Joseph Jr. J was barred by *res judicata* or issue estoppel because of the earlier decision of Wan Adnan J.

(b) Edgar Joseph Jr. J had no jurisdiction to make the order of possession on an interlocutory application as such an order can only be made in a final judgment, that is, after a trial by summary judgment or an order striking out the defence, in this case, when the application to set aside the restraining order was heard, the statement of defence had not been filed.

(2) ***Interpretation of Condition 8 in the conditions of sale***

(a) the interpretation by the Edgar Joseph Jr. J is unduly restrictive as the learned Judge restricted the meaning of tenancy as tenancy protected by endorsement under the NLC; the Court should look at the status of the appellants at the time of the auction sale and could include tenancy arrangement existing between the previous owners and the occupiers at the time of the auction sale.

Held:

[1] The application before Wan Adnan J was an application for possession under O. 89 of RHC, (a summary procedure); as a result of the objection of the appellants that they were in lawful occupation of the said property, Wan Adnan J declined to proceed under O. 89 and dismissed the application - he did not finally decide the status of the appellants. He decided that on the facts shown to him, summary procedure was not available in the circumstances of the case.

[2] (a)The observations made by Wan Adnan J in his grounds of judgment that the tenants were "tenant holding over" were mere observations and made *obiter* and not a finding arrived at on the merits.

(b) Wan Adnan J's judgment was confined to the facts before him and limited to the proposition that since the occupants claimed they were tenants holding over, a summary procedure under O. 89 was not proper. Therefore the question of *res judicata* does not really arise.

[3] On the facts of this case the appellants cannot invoke the doctrine of issue estoppel as there can be no estoppel as against statutory provisions.

[4] (a)As the option to renew the lease was never exercised by the appellants although the appellants contained to occupy the said property, the tenancy was a monthly tenancy;

(b) it is not correct to say that the abandoning by the previous owners of the claim for possession should be construed so as to create a further tenancy for they were then no longer the registered owners of or having any interest in the said property.

[5] (a)Section 267(2) is crucial in this case as there was no endorsement of any tenancy on the register document of title;

(b) since the appellants' lease expired on 21 June 1976 after which they held over as monthly tenant and the charge which resulted in the sale was registered on 15 May 1982 the tenancy would not bind the respondents until the tenancy has become protected by endorsement prior to the date of registration of the certificate of sale.

[6] As the issue for Edgar Joseph Jr. J was whether the appellants were lawful tenants or trespassers, under O. 33 rr. (2) and (5), the learned Judge had jurisdiction to make a final order of possession in this case.

[7] The words "all existing tenancies" must mean only tenancies protected by the NLC; unless so protected, a tenancy exempt from registration, granted after the commencement of the present NLC will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the latter being non-registrable.

[8] Assuming that the appellants were licensees, the service of the summons-in-chambers itself was a notice of determination of the license; in fact, prior to this, the appellants had notice when the respondents' former solicitor served them with a notice to quit dated 20 November 1989 - this was sufficient notice to a bare licensee.

[9] There is no error in law or jurisdiction in Edgar Joseph Jr. J's conclusion and orders.

[Appeal dismissed with costs.]

Cases referred to:

Canas Property v. K.L. Television [1972] All ER 795
Clarke & Ors. v. Chadburn & Ors. [1985] 1 All ER 211
International General Electric Co. of New York Ltd. v. Customs and Excise Commissioners [1962] 2 All ER 398
Letchumi Ammal v. Nam Fong Housing Sdn. Bhd. [1982] CLJ (Rep) 168
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang [1987] CLJ (Rep) 404

Legislation referred to:

National Land Code 1965, ss. 213(1)(a), (3), 223, 228(1)(a), 256, 259(3), 267, (2)
Rules of the High Court 1980, O. 33 r. 2, O. 33 r. 5, O.89
Specific Relief Act 1950, ss. 7, 8(1)

Other source referred to:

Tenure and Land Dealings in the Malay States, David Wong, p. 415

For the appellants - C.V. Das (S.P. Annamalai with him); M/s. Annamalai & Co.
For the respondents - N. Chandran (N. Shanmugam & V.M. Mohan with him); M/s. V.M. Mohan

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

To appreciate fully the real issues raised in this appeal it is best that the background facts of the case be set out first. In their chronological order they may be stated briefly as follows.

The disputed property (hereinafter referred to as the "said property") is premises No. 55 on Lots 366 and 368, T.S. 19, N.E.D. Penang on which stands an 11-storey building. The appellants proprietors of Hotel Ambassador entered into possession of the said property to commence the business of a hotel called Hotel Ambassador. The appellants went into possession of the said property pursuant to a lease and annexure dated 2 January 1967 executed between the appellants and the proprietors of the said property.

The annexure to the lease provided for the rental to be paid by the appellants at RM11,000 per month. Clause 4(e) of the annexure contained provisions for renewal after determination of the first ten years for a further period of ten years on monthly rental of RM12,000 and a further period of ten years at monthly rental of RM13,000. The first initial period of ten years expired on 21 March 1976.

The option for extension of the lease subsequent to the initial period was never exercised or registered or endorsed in the land register and the appellants continued occupation of the said property.

The appellants must have been undergoing a financial strain some time in the early 80's as can be seen from Civil Suit No. 287/89 commenced against them by the previous owners of the said property. The suit was for the recovery of arrears of rental in respect of period February 1984 to May 1989 amounting to RM756,000. The writ also asked for vacant possession. On 3 March 1990 the previous owners obtained judgment for the said sum of RM756,000 but abandoned the claim for possession.

In the meantime the said property had been charged to a finance company, Malayan United Finance Bhd. Subsequently foreclosure action was taken under the charge.

A company, Seapower (M) Sdn. Bhd., the respondents now, purchased the said property at a public auction under the National Land Code. The public auction was held on 26 July 1989 pursuant to an order of sale dated 14 August 1986 made by the High Court, Penang in Originating Summons No. 777/85.

Upon respondents paying the whole purchase price of RM6,000,000 the certificate of sale in form 16F was issued by the Senior Assistant Registrar, High Court, Penang on 8 December 1989 under s. 259(3) of the National Land Code which certificate was under the same provision registrable as if it were an instrument of dealing.

The proclamation of sale contained *inter alia* the following conditions of sale.

> 8. The properties are sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom statute or otherwise.
>
> 12. Upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties.

On 16 February 1990 the respondents took out an Originating Summons No. 113/90 claiming possession of the said property under O. 89 of the Rules of the High Court 1980. After hearing arguments Wan Adnan J dismissed the application. Subsequently the appeal against that order was abandoned.

On 29 May 1990 the appellants took out a writ against the respondents in Civil Suit No. 22-202-90. In the statement of claim the following reliefs were sought:

(a) a declaration that they were the lawful tenants of the said property;

(b) an order to restrain the respondents from interfering with or disturbing their lawful and actual possession and use of the disputed property; and

(c) damages and costs or such other further order or relief as may be just or necessary.

On 29 May 1990 the appellants took out summons in chambers seeking for the order of restrain. The application was subsequently heard *ex parte* and a restraining order was granted with the usual undertaking as to damages. The application to set aside the restraining order was heard *inter partes* on 15 June 1990 whereupon it was adjourned to 16 June 1990 and then to 4 July 1990 and then to 8 September 1990 for further submissions by Counsel. After hearing arguments the learned Judge, Edgar Joseph Jr., made the following orders:

> Accordingly, I discharged the interlocutory injunction dated 29 May 1990 made in favour of the occupants and granted the declaration for vacant possession prayed for by the purchasers. Upon the purchasers going into possession of the disputed property the occupants were to be restrained from interfering with the purchasers' peaceful possession thereof. Damages were to be assessed and paid by the occupants upon enquiry by the Senior Assistant Registrar and the purchasers were to have the costs of the proceedings.

Subsequently Counsel appeared before the learned Judge and the learned Judge exercised his powers under the slip rule and varied the declaratory order so as,

> to require the occupants to deliver vacant possession forthwith to the purchasers.

In his grounds of judgment the learned Judge also recorded that for the avoidance of doubt, he ordered that,

> such damages as are found by the Senior Assistant Registrar to be payable by the occupants shall be paid to the purchasers.

The attack by the appellants against the judgment of the learned Judge may be conveniently classified under two general headings. The first is jurisdictional. The second is the interpretation of the relevant conditions of sale, in particular condition 8 reproduced earlier in the judgment.

On the question of jurisdiction the following issues were raised. Firstly it is the appellants' contention that the claim for vacant possession before Edgar Joseph Jr. J was barred by *res judicata* or issue estoppel because of the earlier decision of Wan Adnan J and the subsequent withdrawal of the appeal against that decision. Secondly it is also the appellants' contention that the learned Judge had no jurisdiction to make the order of possession on an interlocutory application. It is said that such an order can only be made in a final judgment which means after a trial or by summary judgment or an order striking out the defence and entering judgment for the plaintiffs. In this case it is not disputed that when the learned Judge heard the application to set aside the restraining order the statement of defence had not even been filed.

As regards the question of the interpretation of condition 8 it is the appellants' contention that the interpretation by the learned Judge is unduly restrictive and not warranted by the language used in the clause. According to the appellants the learned Judge restricted the meaning of tenancy as tenancy protected by endorsement under the National Land Code. It is argued that the Court should look at the status of the appellants at the time of the auction sale.

The appellants contend that the words "existing tenancies" refer to tenancy arrangement existing between the previous owners and the occupiers at the time of the auction sale and it should not be confined to only registered or protected tenancy under the registered or protected tenancies under the National Land Code.

In our view the earlier decision of Wan Adnan J must be understood in its proper context. What was before the learned Judge then was an application for possession under O. 89 of the Rules of the High Court. It was a summary procedure. Because of the point raised by the appellants purporting to be tenants there and that they were in lawful occupation of the said property, Wan Adnan J declined to proceed under O. 89 and dismissed the application. It must be understood that he did not finally decide the status of the appellants. What he decided was simply that on the facts as shown to him a summary procedure was not proper.

It would appear at the outset of the hearing before Wan Adnan J Counsel for the tenants submitted a preliminary point that the summary procedure under O. 89 was not available in the circumstances of the case. The learned Judge agreed and dismissed the application with costs.

The observations made by Wan Adnan J in his grounds of judgment that the tenants were "tenant holding over" were mere observations and made *obiter* and not a finding arrived at on the merits. In fact in his careful judgment Edgar Joseph Jr. J considered the *ratio decidendi* of the judgment of Wan Adnan J and we agree that the latter's judgment was confined to the facts before him and limited to the proposition that since the occupants claimed they were tenants holding over a summary procedure under O. 89 was not proper. Therefore the question of *res judicata* does not really arise.

On the question of issue estoppel we agree with the learned Judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions. It is not disputed that the application for renewal according to the renewal clause under the annexure to the lease in question was never exercised by the appellants. Under the lease they had six months before the expiry of their tenancy to give notice in writing of their desire to renew. It is not disputed that the appellants continued to be in occupation after the expiry of the initial term of ten years without ever exercising the option either in the manner or within the time specified in the lease or at all.

Section 228(1)(a) of the National Land Code provides *inter alia* that a lease may confer on the lessee an option exercisable **before** the expiry of the term of the lease to require the grant to him a tenancy for a further term. The lease in this case carried such a provision for the option but it was never exercised by the appellants. What actually happened was that upon the expiry of the initial term of ten years under the lease the appellants continued to occupy the said property on what must be a monthly tenancy since the rental was payable with reference to the month. This must and can only be the correct conclusion because as stated earlier in the judgment the previous owners had sued for the recovery of arrears of rentals in respect of period February 1984 to May 1989 amounting to RM756,000 and for vacant possession.

Much has been said about the question of the previous owners having obtained judgment for the arrears of rental then abandoned their claim for possession. It must be understood by then the ownership of the said property had already passed to the respondents. It is not correct to say that the abandoning by the previous owners of the claim for possession should be construed so as to create a further tenancy for they were then no longer the registered owners of or having any interest in the said property.

Section 267 of the National Land Code provides for the effect of sale pursuant to an order of sale made by the Court under s. 256 of the National Land Code. Section 267 states that any certificate of sale given to a purchaser under s. 259(3) of the Code should be treated for all purposes under the Code to be an instrument of dealing and shall be registrable and upon registration thereof the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge. Section 267(2) further provides that notwithstanding that it was granted with the consent in writing of the chargee, no tenancy **exempt from registration** granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title. This statutory provision is crucial in this case because it is not disputed here that there was no endorsement of any tenancy.

Since the appellants' lease expired on 21 June 1976 after which they held over as monthly tenant and the charge which resulted in the sale was registered on 15 May 1982 the tenancy would not bind the respondents until the tenancy has become protected by endorsement prior to the date of registration of the certificate of sale.

Section 267(2) of the Code is an explicit statutory provision and its language clearly requires it to be strictly enforced.

The next question is to consider whether the Judge was correct in making the order as he did in what appears to be an interlocutory proceeding when the statement of defence had not been filed. We are of the view that the issue is lacking in substance and merit.

Firstly it must be noted here that based on the admission of both parties the learned Judge was satisfied that there was no dispute as to the facts and the only point for consideration for him was the question of law, that is, whether the appellants were **lawful tenants** of the said property or were they **trespassers?**

We are of the view that it was within the learned Judge's jurisdiction to make a final order of possession in this case. Order 33, r. 2 of the Rules of the High Court 1980 empowers the Judge to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, **whether raised by the pleadings or otherwise.** Order 33, r. 5 also provides that if it appears to the Court that the decision of any question or issue arising in a cause or matter **substantially disposes of the cause or matter or renders the trial unnecessary,** the Court may dismiss the cause or matter or make such other order or give judgment as may be just. These, in our view, are ample powers under the rules for the Judge in this case to make an order as he did.

In *Clarke and Ors. v. Chadburn & Ors.* [1985] 1 All ER 211 Sir Robert Megarry VC had a motion before him. In that case the officials of a trade union intended to propose at a conference of the union that the union's rules be altered with regard to disciplinary powers over members of the union. On the day before the conference the plaintiffs who were members of the union opposed to the change in the rules, applied *ex parte* for an order restraining the defendants, namely the officials of the union from putting, proposing, allowing to be put or proposed, voting on or passing at the conference any resolution proposing an alteration of the rules aforesaid. The Court granted the order but gave the defendants liberty to apply to discharge or vary it. In disregard of the Court order the defendants put to the vote at a conference the proposed alterations to the rules and the resolutions were passed by two-thirds majority required to effect a change in the rules. The plaintiffs applied for a declaration that the resolutions were void and not binding on the plaintiffs. Megarry in that case established what was obiter in *International General Electric Co. of New York Ltd. v. Customs and Excise Commissioners* [1962] 2 All ER 398 and held that the Court had jurisdiction in interlocutory proceedings to make a final, and not merely an interim, declaration affecting the rights of a party, but that jurisdiction would only be exercised sparingly and infrequently. Megarry found that since the plaintiffs' motion raised an issue which was a matter of public concern affecting the rights of members of the union, the Court was justified in making a final declaration in the terms sought by the motion. In *International General Electric Co of New York Ltd. v. Customs and Excise Commissioners* Upjohn LJ with the concurrence of Diplock LJ rejected the concept of an interim declaration but envisaged the possibility that in certain cases it might be proper to make a declaration of rights in interlocutory proceedings, though this jurisdiction would be infrequently and sparingly exercised. Such a declaration

their Lordships ruled would finally determine the point, and would not operate only as a declaration for the interim. The facts of the instant case fully justify the learned Judge to make the orders as he did.

Finally on the question of interpretation of condition 8 whether it should be confined only to a tenancy endorsed as exempt tenancy under ss. 316 and 317 of the National Land Code prior to the date of registration of the certificate of sale referred to earlier.

Under s. 213(1)(a) of the Code "tenancy exempt from registration" means any tenancy or sub-tenancy for a term not exceeding three years granted pursuant to s. 223 of the Code i.e., granted by the **proprietor** of any alienated land, by any **lessee** or **sub-lessee** for the time being and by any person holding under such tenancy or sub-tenancy.

We agree with the learned Judge that the words "all existing tenancies" must mean only tenancies protected by the Code. We adopt as the learned Judge did what Dr. David Wong said in his book *Tenure and Land Dealings in the Malay States* at p. 415 when referring to s. 213(3) of the Code that,

> unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the later being non-registrable.

In conclusion, what is therefore the status of the appellants *vis-a-vis* the disputed property. According to the learned Judge they are trespassers, or at most, bare licensees based on the facts stated earlier. Assuming they were licensees the service of the summons in chambers itself was a notice of termination of the licence. The case of *Canas Property v. K.L. Television* [1972] All ER 795 is authority for the proposition that the service of proceedings claiming possession makes the persons on whom the proceedings are served trespassers. In the Court of Appeal (Lord Denning MR, Fenton Atkinson and Megaw LJJ) the question raised was - if a landlord brings an action for forfeiture when does the lease come to an end? When the writ is issued or when it is served? It was held that:

> A lessor does not effect a forfeiture merely by issuing a writ for possession against a lessee or assignee who is in breach of covenant. It is the service, not the issue of the writ which is equivalent to re-entry and effects a forfeiture; and the lease is determined from the date of service.

In fact prior to the issue of summons in chambers in this case the appellants had notice when the respondents' former solicitors served them with the notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from the date of receipt thereof which the learned Judge held to be more than sufficient notice to a bare licensee. We agree.

In a much misunderstood judgment of this Court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang* [1987] CLJ (Rep) 404 which had brought about contempt proceedings the stand of our Courts with regard to trespassers and the rights of persons entitled to possession is set out in the judgment at p. 414 as follows:

> Our Courts have consistently subscribed to the principle that one who has the right to enter upon another's land and act in excess of this right or after his right has expired is a trespasser - see *Sidek bin Hj. Muhammad and Letchumi Ammal v. Nam Fong Housing Sdn. Bhd.* ([1982] CLJ (Rep) 168). Both these cases were decided by the former Federal Court and both appeals were heard about the same time by different quorums in early February and March 1982.

Sections 7 and 8 of our Specific Relief Act should be read conjunctively. Section 8(1) of the Act clearly implies the remedy of self-help. Section 8(1) presupposes a person entitled to possession but is dispossessed contrary to his rights. It is understood that the landlord if he recovers possession otherwise than by the normal process of Court action opens himself to the risk of being sued by the person dispossessed. That is the risk he must take.

Having gone through the careful judgment of the learned Judge we detect no error in law or jurisdiction in his conclusions and orders.

The appeal is accordingly dismissed with costs here and below.

Also found at [1991] 1 CLJ 656